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NOTE

OBSCENITY† ON-LINE: A TRANSACTIONAL APPROACH TO COMPUTER TRANSFERS OF POTENTIALLY OBSCENE MATERIAL††

† Obscenity is a legal conclusion, much like proximate cause. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting) (“[O]ne cannot say with certainty that material is obscene until at least five members of this Court . . . have pronounced it so.”). Material that has not been adjudicated cannot correctly be termed “obscene,” because no conclusion has been reached regarding it. This Note uses “obscene” in this literal sense, substituting “allegedly obscene,” “offensive,” “indecent,” and similar terms when applied to material about which the obscenity question might be raised. The term “pornography” and its cognates are avoided, both because of the emotional baggage they carry, and because they are sometimes used in the sense of “obscene” and sometimes in the sense of “offensive.” The term “obscurity,” as used in this Note, refers to the set of legal issues involving allegedly obscene material.

Allegedly obscene materials enjoy First Amendment protection. *See* Roaden v. Kentucky, 413 U.S. 496, 504 (1973) (explaining that potentially obscene materials receive “presumptive protection” under the First Amendment). A charge that material is obscene must overcome this constitutional hurdle.

“Child pornography” does not enjoy First Amendment protection. *See* New York v. Ferber, 458 U.S. 747 (1982). This Note does not discuss child pornography because the constitutional dimension is central to its analysis.

†† “On-line” is a general term which means “having to do with networked computers.” Donna A. Gallagher, Comment, *Free Speech on the Line: Modern Technology and the First Amendment*, 3 COMM.LAW CONSPICUOUS 197, 197-98 n.6 (1995); *see also* HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 7 (1993). Computers are “networked” when they are connected to permit transmission of data from one to another. *See* Gallagher, *supra*, at 197-99. In particular, on-line often refers to the domain of computer-mediated communication (CMC), *see* RHEINGOLD, *supra*, at 5-7, which, broadly described, is the use of networked computers for interpersonal communication. *See* Michel Bauwens, *What is Cyberspace?*, COMPUTERS IN LIBRARIES, Apr. 1994, at 42. There are many sorts of CMC: for example, electronic mail (e-mail), *see id.*; transfer of documents, databases, images, sounds, programs, or any other kind of computer file (file transfer), *see id.* at 42-44; “party line” connections that allow users to send messages to the connected users in real time (chat rooms); more elaborate “virtual reality” environments where users interact with each other and with objects they program into the environment (MUDs, MOOs); and multimedia hypertext as found on the World Wide Web (WWW).

“Virtual” indicates having existence on-line only. “Cyber-” is a prefix with a range of meanings from “on-line” to “virtual.” “Cyberspace” is the on-line environment in its entirety, viewed metaphorically as a place. *See* Andrew Grosso, Feature, *The National Information Infrastructure*, 41 FED. B. NEWS & J. 481, 481 (1994) (citation omitted); Bauwens, *supra*, at 42. The “virtual” or “cyber” community is the set of on-line computer users, viewed metaphorically as the citizens or occupants of cyberspace. “Hypertext” refers to a system of associational links that allow the computer user to “jump” to related information easily. “Downloading” is the process of transferring files from an on-line source to the user’s own computer. *See* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1969 n.4 (1995). The most familiar CMC environments are the local-area networks (LANs) found in many offices; the wide-area networks (WANs) used by geographically extended organizations; computer bulletin-board systems (BBSs);

INTRODUCTION

United States Supreme Court decisions denying First Amendment protection to obscene materials¹ are in tension² with the right the Court has upheld to possess obscene materials in the privacy of one's home.³ In order to allow regulation of obscene materials while respecting the right to private possession, the Court has found that states have a legitimate interest in protecting the public from contact with obscene materials in the community.⁴ In some cases in which the Court has allowed regulation, this risk of public contact has been remote,⁵ putting a great strain on the community-contact rationale.⁶ Computer-mediated communications further highlight this tension by providing the means to deliver obscene materials directly into the privacy of one's home, without risk of contact with the community at large.⁷

This Note argues that contrary to the suggestions of some recent commentators,⁸ existing law can satisfactorily handle obscenity on

and the Internet, which is a huge system interconnecting many LANs and WANs. See Grosso, *supra*, at 481-83 (discussing BBSs and the Internet).

Obscenity on-line, then, refers to the set of issues raised by potentially obscene materials in the context of computer-mediated communications.

¹ See *Hamling v. United States*, 418 U.S. 87, 111 (1974); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-foot Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 23-25 (1973); *United States v. Reidel*, 402 U.S. 351, 356 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). See also *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (obscenity is not protected under the First or Fourteenth Amendments) (citing *Roth*); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) (obscenity is not subject to the guarantees of free speech and press).

² See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-7, at 1322-23 (2d ed. 1988); *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part) (stating that it is "somewhat illogical . . . that a person may be prosecuted . . . for providing another with material he has a constitutional right to possess").

³ See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (asserting "the right [of a person] to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home").

⁴ See *United States v. Orito*, 413 U.S. at 143 (distinguishing between private possession and transportation on the ground of the risk of loss of control of the materials during transportation "regardless of a transporter's professed intent").

⁵ For example, there is very little risk of contact between obscene material entrusted to the Post Office in a plain wrapper and the community at large. Only in the case of misdirection, theft, or accidental rupture of the packaging is the public at risk of exposure to the materials. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 209 (1995).

⁶ See *infra* Part I.B.

⁷ See *infra* Part I.B.; Electronic Frontier Foundation, Brief for Amicus Curiae at 5, *United States v. Thomas*, 74 F.3d 701 (6th Cir.) (Nos. 94-6648/6649) (stating that "networked communications . . . never actually enter any physical community"), *cert. denied*, 117 S. Ct. 74 (1996).

⁸ See TRIBE, *supra* note 2, § 12-25, at 1007; Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639,

computer networks.⁹ The law need not and should not recognize a "virtual community" for purposes of the community standards analysis set forth in *Miller v. California*.¹⁰ However, to facilitate the Court's policy of allowing local communities to set their own standards, and to avoid inequitable decisions under the existing law, courts need to re-examine their understanding of on-line transactions. This Note argues that the usual case of computer transaction—a willing viewer downloading¹¹ potentially obscene materials on-line—is similar to the recipient traveling to the supplier's location and returning with the

1652-54 (1995) (asserting the independence of the "virtual community" of computer-mediated communicators from geographical communities, and arguing that the virtual community's standards should govern an obscenity analysis, at least where no harmful consequences can be demonstrated in a geographical community); Byassee, *supra* note 5, at 209-10 ("[T]he computer user's interaction transcends the local community because that user, from the privacy of her own home, is participating in a community for which geographical bounds are irrelevant. The physical conduct of using the computer—of connecting to cyberspace—may occur in a physical location, but that is not the conduct to which the community standards test applies."); Mike W. Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 8 (1994) (advocating use of the "cyber-community" for community standards analysis); Symposium, *First Amendment and the Media: Regulating Interactive Communications on the Information Superhighway*, Panel I: *The Changing Landscape of First Amendment Jurisprudence in Light of the Technological Advances in Media*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 254-55 (1995) [hereinafter Symposium, *First Amendment and the Media*] (advocating either a national obscenity standard or the use of the "cyber-community" for community standards analysis); Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 189 (1995) (advocating a national obscenity standard); Jeffrey E. Faucette, Note, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1166 (1995) (noting that "it is unclear what the community standard test means when applied to a nonphysical community"); Robert F. Goldman, Note, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1104-05 (1995) (arguing that "dropping the 'community standards' prong of the *Miller* test seems the obvious solution for a medium such as the Internet, which knows no geographical or jurisdictional boundaries"); Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415, 430, 441 (1995) (advocating use of the virtual community for community standards analysis; suggesting either a national obscenity standard, the virtual community standard, a national per se obscenity rule, or limiting venue to the place of dispatch).

⁹ Professor Sunstein, among others, has advanced this view. See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1792 (1995) (arguing that although computer-mediated communications "put high pressure on old [legal] categories[,] . . . it is by no means clear that the basic principles [of law] will themselves have to be much changed."). But while Professor Sunstein argues that ordinary mail provides the best analogy for computer-mediated communications, *id.* at 1799, this Note rejects the postal analogy. See *infra* Part II.A.

¹⁰ 413 U.S. 15, 33 (1973) ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.").

¹¹ "Downloading" is the process of transferring files from a computer dedicated to storing files (a "server") to a user's computer.

allegedly obscene material,¹² yet distinguishable from the supplier sending the allegedly obscene material to the recipient. This view of the on-line transaction would not impose liability on suppliers for making available material that meets the standards of the community where the supplier's computer is located.

Part I reviews American obscenity law with particular attention to the tension mentioned above and to the rationales for court decisions, advancing a view that describes the tension as a conflict between the privacy rights of willing viewers and the privacy rights of people who wish to prevent their (and their children's) exposure to obscene materials. Part II considers whether existing law is adequate to the task of deciding on-line obscenity issues, or whether a new paradigm is required. Several views are examined, including the view that the virtual community should be the relevant community for *Miller* community standards analysis. This Note concludes that the virtual community view is incorrect, and that existing law is adequate for deciding the usual on-line obscenity cases. Part III considers which geographical community—that of the provider or that of the recipient of the potentially obscene materials—should govern the *Miller* community standards analysis in on-line cases, concluding that the standards of the provider's community should govern. Part IV examines recent constitutional challenges to federal obscenity law, concluding that facts about the Internet found independently by two federal three-judge panels, which are likely to be ratified by the Supreme Court on review, strongly support the arguments of this Note.

To put the issues raised in a practical perspective, this Note examines *United States v. Thomas*.¹³ However, the analysis is not confined to the facts or to the issues raised at trial or on appeal in *Thomas*.

¹² See Electronic Frontier Foundation, Brief for Amicus Curiae at 6, *United States v. Thomas*, 74 F.3d 701 (6th Cir.) (Nos. 94-6648/6649) (downloading files from a BBS is "operationally indistinguishable" from traveling to obtain them, and in the latter case the law imposes no liability on the seller), *cert. denied*, 117 S. Ct. 74 (1996); Electronic Frontier Foundation, *A Virtual Amicus Brief in the Amateur Action Appeal* (visited Apr. 1, 1997) <http://www.eff.org/pub/Legal/Cases/AABBS_Thomas/Memphis/Old/aa_eff_virtual_amicus.brief> (downloading files from a BBS is "operationally indistinguishable" from traveling to obtain them, and imposing liability on the recipient would be "tantamount to restricting the purchaser's constitutionally-protected right to interstate travel"); Kim, *supra* note 8, at 434 (briefly mentioning this analogy); *Sex on the Internet: When Bavaria Wrinkles its Nose, Must the Whole World Catch a Cold?* THE ECONOMIST, Jan. 6 1996, at 18.

¹³ *United States v. Thomas*, CR-94-20019-G (W.D. Tenn. Dec. 13, 1994) (conviction and forfeiture order) (a California couple who operated an adult BBS were convicted on federal obscenity charges in Memphis, Tennessee, when images downloaded by a postal inspector in Memphis were judged obscene by local community standards), *aff'd*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

I

BACKGROUND: AMERICAN OBSCENITY LAW

A. Case Law¹⁴1. *Protection for the Private Possession of Obscene Materials*

Although the states and the federal government have great latitude to regulate obscene materials,¹⁵ that power is not absolute. In *Stanley v. Georgia*,¹⁶ the Court held that “the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.”¹⁷

Government agents executed a search warrant for evidence of Stanley’s alleged bookmaking activities.¹⁸ The agents found three reels of movie film in a desk drawer.¹⁹ After viewing the films on Stanley’s projector, they concluded that the films were obscene and arrested Stanley for violating a Georgia obscenity statute.²⁰ Stanley did not dispute the obscene nature of the films, and the Court assumed that they were obscene “under any of the tests advanced by members of this Court.”²¹

Justice Marshall, writing for the Court, distinguished mere private possession of obscene materials from “public actions” such as distribution and dissemination.²² Although Marshall recognized that “*Roth*

¹⁴ The discussion in this Part owes a debt to Professor Tribe’s treatment of obscenity law, see *TRIBE*, *supra* note 2, § 12-16, and to FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* (1976). Summaries of American obscenity law are also given in Honorable Joseph T. Clark, *The “Community Standard” in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13 (1993); Scot A. Duvall, *A Call For Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 78-84 (1992); Mary C. Mertz Parnell, *Applying Community Standards to International Direct Broadcast Satellites: Can the United States Know Obscenity Without Seeing It?* 17 SUFFOLK TRANSNAT’L L. REV. 473, 478-81 (1994); Chiu, *supra* note 8, at 189-99; Donovan W. Gaede, Comment, *Constitutional Law—Policing the Obscene: Modern Obscenity Doctrine Re-evaluated*, 18 S. ILL. U. L.J. 439, 440-47 (1994); Goldman, *supra* note 8, at 1088-98.

¹⁵ See *infra* Part I.A.2.

¹⁶ 394 U.S. 557 (1969).

¹⁷ *Id.* at 568.

¹⁸ See *id.* at 558.

¹⁹ See *id.*

²⁰ See *id.*

²¹ *Id.* at 559 n.2. See *infra* Parts I.A.2.b-c for a discussion of the Court’s proliferation of tests for obscenity.

²² None of the statements cited by the Court in *Roth* for the proposition that “this Court has always assumed that obscenity is not protected by the freedoms of speech and press” were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. Moreover, none of this Court’s decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.

and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity,"²³ he noted that the important government interest is "in the regulation of commercial distribution of obscene material"²⁴ and that "the assertion of that interest cannot, in every context, be insulated from all constitutional protections."²⁵

Marshall grounded the right to possess obscene materials in private on two fundamental constitutional principles—the right to receive information and the right to privacy:

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . ." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. . . . [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.²⁶

Marshall reasoned that the Constitution included these rights among its most fundamental principles because they express the most fundamental values of our society. The right to receive information and the right to privacy rest on our aversion to being told what to believe.²⁷

Because the Court grounded the protection for private possession of obscene materials in such basic and fundamental constitutional principles, it would be very difficult for the Court simply to ignore this protection as it develops obscenity jurisprudence.

Id. at 560-61 (footnote omitted). *Roth v. United States*, 354 U.S. 476 (1957), and its progeny generally deny constitutional protection to obscene materials. See *infra* Part I.A.2.b.

²³ *Stanley*, 394 U.S. at 563.

²⁴ *Id.* at 563-64.

²⁵ *Id.* at 563.

²⁶ *Id.* at 564 (alterations in original) (citations omitted).

²⁷ The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Id. at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

. . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Id. at 565-66.

In *Stanley*, the Court rejected three justifications offered by the state of Georgia in support of its obscenity regulations. In each instance, the Court found the state interest inadequate to challenge the fundamental right to private possession of obscene materials. First, Georgia argued, the state has an interest in the morality of its citizens, which is inconsistent with the possession of obscene materials.²⁸ The Court responded that the interest Georgia sought to protect was simply thought control, which is antithetical to the First Amendment.²⁹

Second, Georgia argued that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."³⁰ The Court remarked that there was scant empirical evidence for this proposition, but that more importantly,

if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law"³¹

The Court concluded that "the State may no more prohibit the mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."³²

The Court noted that obscene material "might fall into the hands of children, or that it might intrude upon the sensibilities or privacy of the general public,"³³ but concluded that "[n]o such dangers are pres-

²⁸ See *id.* at 565.

²⁹ Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959), "(t)his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." . . . Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Id. at 565-66 (alteration in original) (footnote omitted) (citation omitted).

³⁰ *Id.* at 566.

³¹ *Id.* at 566-67 (alteration in original) (citation omitted).

³² *Id.* at 567.

³³ *Id.* (citations omitted).

ent in this case,"³⁴ implying that either occurrence would be a "public action" rather than private possession.

Third, Georgia argued that proving intent to distribute was such a burden that prohibition of private possession was necessary to make enforcement of laws against public obscenity offenses possible.³⁵ The Court responded:

We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.³⁶

The Court was careful to qualify its conclusion by stating that regulation of obscenity is permissible on the public side of its public/private distinction. "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."³⁷ The Court's distinction between the private and public spheres has influenced the development of obscenity jurisprudence. In order for the government to regulate obscenity, it must show that the conduct regulated is in some way public. This aspect of obscenity law is sometimes called the "community contact" requirement.

Although the Court has not wavered in its view of the *strength* of the right protected in *Stanley*, it has narrowed the *scope* of the right by drawing the dividing line between private and public conduct at the doorway of one's own home to give legislators the greatest possible room to regulate obscenity. The Court has restricted the domain of privacy to its smallest possible extent, thereby expanding the public sphere.³⁸

The Court has held that *Stanley* does not confer a right to import³⁹ or to supply obscene materials.⁴⁰ Confining exposure to obscene materials to consenting adults is not sufficient to make the

³⁴ *Id.*

³⁵ *See id.* at 567.

³⁶ *Id.* at 567-68.

³⁷ *Id.*

³⁸ *See infra* notes 39-45 and accompanying text.

³⁹ *See United States v. 12 200-foot Reels of Super 8mm Film*, 413 U.S. 123 (1973).

⁴⁰ To extrapolate from *Stanley*'s right to have and peruse obscene material in the privacy of his own home a First Amendment right in *Reidel* to sell it to him would effectively scuttle *Roth* Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which *Reidel* engaged here.

United States v. Reidel, 402 U.S. 351, 355 (1971).

context "private."⁴¹ The Court has limited the *Stanley* right of private possession to the home⁴² and has denied that a "'zone' of 'privacy' follows a [possessor] of obscene materials wherever he goes."⁴³ In *United States v. Orito*,⁴⁴ the Court distinguished between private possession in the home and transportation on "the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent."⁴⁵

Justice Stevens criticized the narrow interpretation of the right to possess obscene materials in private, saying that it is "somewhat illogical [that] a person may be prosecuted . . . for providing another with material he has a constitutional right to possess."⁴⁶

The Court's narrow interpretation of the scope of the right to private possession of obscene materials indicates that the Court has no interest in expanding protection for obscene materials. At the same time, the grounding of the right in basic and fundamental constitutional principles makes it unlikely that the Court will overrule *Stanley* and withdraw protection from the possession of obscene materials in one's own home.

Following a discussion of the background of non-protection of obscene materials in public contexts, Part I.B discusses the tension between protection of obscene materials in private and non-protection in public.⁴⁷

2. *Non-Protection of Obscene Materials in Public*

a. *Early History of American Obscenity Law*

Obscenity prosecutions in the United States at common law date back at least to 1815.⁴⁸ States enacted obscenity statutes beginning in 1821,⁴⁹ and the federal government followed in 1842.⁵⁰ New York enacted the Comstock Act⁵¹ to fight obscenity in 1868, and the federal

⁴¹ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973) (confining private context to personal rights that are fundamental or implicit in the concept of ordered liberty, specifically those of personal intimacy at home, family, marriage, motherhood, procreation, and child-rearing).

⁴² See *id.* at 66 (*Stanley* was decided "on the narrow basis of the 'privacy of the home' which was hardly more than 'a man's home is his castle.'").

⁴³ *Id.*

⁴⁴ 413 U.S. 139 (1973).

⁴⁵ *Id.* at 143.

⁴⁶ *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).

⁴⁷ See *infra* Part I.B.

⁴⁸ See *TRIBE*, *supra* note 2, § 12-16, at 906 (citing *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (1815), as the first reported American obscenity case).

⁴⁹ See *id.* (identifying Vermont as the first state to enact an obscenity statute).

⁵⁰ See *id.* (identifying ch. 270, 5 Stat. 566 (1842) as the first federal obscenity statute).

⁵¹ 7 New York Stats. 309 (1868).

government criminalized the use of the mails to distribute obscene materials in 1873.⁵² In *Regina v. Hicklin*,⁵³ Lord Chief Justice Cockburn gave the first enduring definition of obscenity in Anglo-American law: "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁵⁴ American courts adopted this definition,⁵⁵ which in their hands "came to stand for the double proposition that obscenity was to be measured by its effect on the most susceptible, and that obscenity of the work as a whole was to be judged by the effect of isolated passages."⁵⁶ The *Hicklin* standard required courts to exempt the classics of literature on a case-by-case basis, and resulted in the prohibition of much contemporary literature.⁵⁷

In 1934, the Second Circuit replaced the *Hicklin* standard in a widely-followed opinion stating that obscenity should be measured by the "effect on the average reader of the dominant theme of the work as a whole."⁵⁸

b. *The Modern Era: The Social Value of Speech*

In 1942, the Court articulated a two-level classification⁵⁹ of speech. According to the Court in *Chaplinsky v. New Hampshire*,⁶⁰ certain types of speech are not protected because they are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁶¹ The words at issue in *Chaplinsky* were "fighting words," and the Court's analysis extended to defamation and obscenity as well.⁶²

In 1957, the Court decided *Roth v. United States*.⁶³ Justice Brennan announced the Court's test for obscenity: "whether to the average person, applying contemporary community standards, the dominant

⁵² Ch. 258, 17 Stat. 599 (1873).

⁵³ 3 L.R.-Q.B. 360 (1868).

⁵⁴ *TRIBE*, *supra* note 2, § 12-16, at 906 (quoting *Regina v. Hicklin*, 3 L.R.-Q.B. at 368).

⁵⁵ *See id.* § 12-16, at 906.

⁵⁶ *Id.*

⁵⁷ *See id.* at 906-07.

⁵⁸ *Id.* at 907 (referring to *United States v. One Book Called "Ulysses,"* 72 F.2d 705 (2d Cir. 1934)).

⁵⁹ *See id.* § 12-18, at 929 and n.2 (attributing the term "two-level theory" to Harry Kalven, *Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 78-79 (1973) (Brennan, J., dissenting) ("Roth rested . . . on what has been termed a two-level approach to the question of obscenity").

⁶⁰ 315 U.S. 568 (1942).

⁶¹ *Id.* at 572.

⁶² *See id.*

⁶³ 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press.").

theme of the material taken as a whole appeals to prurient interest."⁶⁴ In keeping with the reasoning of *Chaplinsky*, the Court denied constitutional protection to obscene materials on the basis of their lack of social value:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [against abridgement of the freedom of speech and of the press]. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.⁶⁵

The *Roth* test has been modified several times,⁶⁶ but it is recognizable as the ancestor of our present obscenity standard.

c. *Community Standards: National or Local?*

The Court had difficulty applying the *Roth* standard from the start.⁶⁷ Two difficulties were interpreting the term "prurient interest," and deciding whether the lack of social value of materials was a reason to prohibit them once they were found obscene or was part of the test for obscenity.⁶⁸

Another question, hotly debated by the Court for sixteen years, was whether the "community standards" against which allegedly obscene materials were measured were local or national standards.⁶⁹ Ad-

⁶⁴ *Id.* at 489 (listing cases in which lower courts had applied this test).

⁶⁵ *Id.* at 484.

⁶⁶ See *infra* Part I.A.2.c.

⁶⁷ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting) ("[O]ur efforts to implement [the Roth] approach demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term."). See also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., separate opinion) (the Court's approach has "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."); *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964) (showing that it is possible to read *Roth* in a variety of ways); *TRIBE*, *supra* note 2, § 12-16, at 909 ("not until 1973 could any five Justices agree on a definition of 'what constitutes obscene, pornographic material subject to regulation under the States' police power,'" quoting *Miller v. California*, 413 U.S. 15, 22 (1973)).

⁶⁸ See "*John Cleland's Memoirs of a Woman of Pleasure*" v. Massachusetts, 383 U.S. 413, 418 (1966) (holding that obscenity requires three elements conjointly: utter lack of social value, a dominant theme appealing to the prurient interest in sex when the work is taken as a whole, and patent offensiveness to the contemporary community standards regarding sexual matters); *TRIBE*, *supra* note 2, § 12-16, at 908-12. These interpretational matters are not addressed here.

⁶⁹ There was no majority opinion on this issue until *Miller v. California*, 413 U.S. 15 (1973), in large part because several Justices did not accept the *Roth* framework. Justices Black and Douglas advocated an absolutist interpretation of the First Amendment, see, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 196-97 (1964); Justice Stewart urged a "hard-core pornography" standard, see, e.g., *id.* at 197; and Justice Harlan sought different standards for state and federal restrictions see, e.g., *id.* at 203-04.

vocates of a national standard find the notion repugnant that a constitutional guarantee of liberty might offer different protection in different places.⁷⁰ Advocates of a local standard respond that it is the nature of obscenity to be community-relative.⁷¹ On this view, the guarantee is the same from one community to the next—one may say whatever one wants as long as it is not obscene—but the allowable content of one's speech varies by the tolerance of the particular community.⁷²

Two prominent plurality opinions called for a national standard. In *Manual Enterprises v. Day*,⁷³ Justice Harlan interpreted *Roth* to incorporate a national standard of decency, reasoning that a local standard would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency."⁷⁴ In *Jacobellis v. Ohio*,⁷⁵ Justice Brennan advanced this position.⁷⁶ Brennan argued that Judge Learned Hand first enunciated the concept of "contemporary community standards,"⁷⁷ and that by it he meant national standards.⁷⁸ Brennan also reasoned that a local interpretation would not be constitutional—in his words, that it cannot "properly be employed in delineating the area of expression that is protected by the Federal Constitution."⁷⁹ Brennan worried that without a national standard of obscenity the American people would suffer a limitation of their First Amendment rights, either at the hands of their own local governments, or through the limitations of other local governments in combination with the risk-aversion of suppliers.⁸⁰

Chief Justice Warren in his dissent urged the adoption of a local standard,⁸¹ arguing that there is "no provable 'national standard,'" and that because "communities throughout the Nation are in fact di-

⁷⁰ See *infra* notes 73-79 and accompanying text.

⁷¹ See *infra* notes 81-83 and accompanying text.

⁷² See *infra* notes 81-83 and accompanying text.

⁷³ 370 U.S. 478 (1962).

⁷⁴ *Id.* at 488.

⁷⁵ 378 U.S. 184 (1964).

⁷⁶ *Id.* at 192-95.

⁷⁷ *Id.* at 192 (citing *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913)).

⁷⁸ See *id.* at 192-93.

⁷⁹ *Id.* at 193.

⁸⁰ [T]o sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. . . . The result would thus be 'to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.'

Id. at 194 (quoting *Smith v. California*, 361 U.S. 147, 154 (1959)).

⁸¹ See *id.* at 200-01.

verse," it is natural that material deemed obscene in one community would be tolerated in others.⁸² The Chief Justice saw the issue as a balancing of the interests of the community against the rights of individuals,⁸³ and worried that no nationwide standard could accommodate the diversity of local cultures in determining the correct balance.

In 1973, the community standards issue was resolved when five Justices agreed on a revision of the *Roth-Memoirs* test which specified a local community standard.⁸⁴ The *Miller* test is in three parts:

(a) whether "the average person, applying contemporary community standards" would find that the work, when taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁸⁵

The first two prongs are applied using "contemporary community standards."⁸⁶ Contemporary community standards are those of the forum community;⁸⁷ there is no national standard of obscenity.⁸⁸

Chief Justice Burger delivered the opinion of the Court. He argued first that a national standard is unmanageable. The Chief Justice distinguished "fundamental First Amendment limitations on the powers of the States,"⁸⁹ which "do not vary from community to community,"⁹⁰ from "standards of . . . what appeals to the 'prurient interest' or is 'patently offensive,'" ⁹¹ which are "essentially questions of fact."⁹² He argued that the pluralistic nature of the Union makes uniform standards impractical; furthermore, even if the Court could formulate

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *Miller v. California*, 413 U.S. 15, 29 (1973) ("[T]oday, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment.").

⁸⁵ *Id.* at 24 (citations omitted). It deserves mention, but only in passing in the context of this Note, that the Court explicitly rejected the "'utterly without redeeming social value' test of *Memoirs v. Massachusetts*," *id.*, and adopted the "lack[ing] serious literary, artistic, political, or scientific value" test, *id.* See *TRIBE*, *supra* note 2, § 12-16, at 908-09.

⁸⁶ *TRIBE*, *supra* note 2, § 12-16, at 908; see also *Pope v. Illinois*, 481 U.S. 497, 500 (1987).

⁸⁷ See *Pope v. Illinois*, 481 U.S. at 500.

⁸⁸ See *Miller v. California*, 413 U.S. at 30-31; *Pope v. Illinois*, 481 U.S. at 499. But see *Smith v. United States*, 431 U.S. 291, 300-01 (1977) (third prong of the *Miller* test is not to be evaluated using a local community standard; determination of social value of materials is made using the reasonable person standard).

⁸⁹ *Miller v. California*, 413 U.S. at 30.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

a standard which would meet the needs of the whole country, it would be judicially unmanageable.⁹³

Chief Justice Burger correctly pointed out that the worry motivating Justice Brennan's argument in *Jacobellis*—that local community standards might prevent distribution of constitutionally allowable materials through the risk-aversion of suppliers⁹⁴—is equally true of national standards.⁹⁵ Unless the national standard were set at the level of the most tolerant community, it would necessarily prevent dissemination of certain materials in some communities that would otherwise tolerate them.⁹⁶ A national standard escapes this problem only if it is maximally permissive, in which case less tolerant communities are forced to accept materials to which they object. Local community standards, on the other hand, enable each community to set its own tolerance level. The Chief Justice argued that

[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.⁹⁷

As long as communities differ in their tolerance for sexually oriented material, a national standard will impose the standards of some community upon the rest of the country. A permissive national standard would force less tolerant communities to accept material they find offensive. A restrictive national standard would prevent tolerant communities from access to materials they would otherwise accept. And an "average" national standard would do some of each. If Justice Brennan is correct about the risk-aversion of suppliers of potentially obscene material, then a local standard will also suppress the distribution of some constitutionally allowable materials.

Whether one favors a national standard or a local standard depends, among other things, on how one views conflicts between society and the individual, how free one thinks speakers ought to be,

⁹³ [O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. . . . To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.

Id.

⁹⁴ See *supra* notes 73-80 and accompanying text.

⁹⁵ See *Miller*, 413 U.S. at 32-33 n.13.

⁹⁶ See *id.*

⁹⁷ *Id.* at 32-33.

whether local or national government is more likely to get it right when regulating, where the standard might be located in relation to one's own tolerance, and whether Justice Brennan is right about the risk-aversion of suppliers of potentially obscene material.

Chief Justice Burger argued that we don't want the most permissive community to set the standard for the whole country, while Justice Brennan argued that we don't want the most restrictive community to set the standard for the whole country. Their common ground seems to be the principle that communities should not have their standards set by other communities.⁹⁸ Because a national standard cannot honor this principle, the better approach seems to be to adopt the local community standard, taking whatever steps are possible to mitigate the risk-aversion of suppliers, and thereby minimizing the influence of some communities over others.

d. *The Rationales for Non-Protection of Obscene Materials in Public*

It is a commonplace in obscenity jurisprudence that the First Amendment does not protect obscene materials.⁹⁹ One of the premises of this conclusion is that obscene materials lack sufficient social value to merit protection.¹⁰⁰ The other necessary premise involves the state interest in restricting the availability of such materials.

In *Redrup v. New York*,¹⁰¹ the Court reversed three state court convictions because

in none of these cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles[,] . . . [nor] any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it[,] . . . [nor] evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*.¹⁰²

The *Redrup* decision suggests that the Court considered a concern for children, intrusion into the privacy of unconsenting adults, and prevention of public commercialization of sexual materials to be state in-

⁹⁸ Each Justice seems willing to abandon the principle if, as applied, it will not generate the results he seeks. This willingness may be based on judgments that errors are not symmetrical. Perhaps Justice Burger thinks that some over-restriction is preferable to forcing any community to accept material deemed offensive, and Justice Brennan thinks that some forcing of communities to accept offensive material is preferable to any over-restriction.

⁹⁹ See, e.g., *Miller v. California*, 413 U.S. 15, 36 (1973) ("[W]e . . . reaffirm the *Roth* holding that obscene material is not protected by the First Amendment. . . ."); see also *supra* Part I.A.2.b.

¹⁰⁰ See *supra* Part I.A.2.b.

¹⁰¹ 386 U.S. 767 (1967).

¹⁰² *Id.* at 769.

terests that might justify withholding First Amendment protection. Finding none of these interests present, the Court held that the materials in each case were "protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem*."¹⁰³

*Paris Adult Theatre I v. Slaton*¹⁰⁴ is often cited as the first case in which the Court discussed the state interest in regulating obscene materials.¹⁰⁵ Chief Justice Burger identified several substantial state interests implicating the distribution of obscene materials: (1) exposure of children and unconsenting adults;¹⁰⁶ (2) the quality of public life and the community environment;¹⁰⁷ (3) the "tone of commerce in the great city centers;"¹⁰⁸ and (4) "possibly, the public safety itself."¹⁰⁹ One does not know quite what to make of the "tone of commerce" rationale without merging it into the "public life and community environment" interest. For purposes of the following discussion this merger is assumed.

Chief Justice Burger argues that "there is at least an arguable correlation between obscene material and crime."¹¹⁰ This is the very argument rejected by the Court in *Stanley*.¹¹¹ But while the Court held that Stanley's right to possess obscene materials in private was protected by the First and Fourteenth Amendments,¹¹² the Court in *Paris* concluded that there is no constitutional protection for obscene materials in the context of public theaters, even if entry is limited to consenting adults. On this assumption, the state interest need only be rational for the restriction to survive judicial scrutiny.

Given this assumption, the Court properly concluded that evidence of the correlation between obscene material and crime, though far from conclusive, was sufficient to find the state interest rational. But as a justification for denying First Amendment protection to obscene materials in public contexts, the argument begs the question: If

¹⁰³ *Id.* at 770 (footnote omitted).

¹⁰⁴ 413 U.S. 49 (1973).

¹⁰⁵ See, e.g., TRIBE, *supra* note 2, § 12-16, at 916-17 and nn.76-79 (in *Paris* the Court "undertook for the first time to explain *why* society could suppress the obscene." *Id.* at 916). But see *supra* Part I.A.1, discussing *Stanley v. Georgia*, 394 U.S. 557 (1969) (rejecting three state-interest arguments made by the State of Georgia in the context of private possession of obscene materials); *Redrup v. N.Y.*, 386 U.S. 767, 769-70 (1967) (extending First and Fourteenth Amendment protection to materials that did not implicate state interests in protecting children, protecting unconsenting adults, or preventing pandering).

¹⁰⁶ See *Paris Adult Theatre I*, 413 U.S. at 57 (citing *Miller v. California*, 413 U.S. 15, 18-20 (1973)).

¹⁰⁷ See *id.* at 58.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (footnote omitted).

¹¹¹ See *supra* Part I.A.1.

¹¹² See *supra* Part I.A.1.

the arguable connection between obscene materials and crime is sufficient ground to regulate obscene materials only if they are not protected by the First Amendment, then this arguable connection cannot be used to justify denial of First Amendment protection in the first place. The non-protection of obscene materials is assumed in the justification for non-protection.

Pandering, as a justification for denying First Amendment protection to obscene materials, suffers from the same defect. In *Ginzburg v. United States*,¹¹³ the Court indicated that lower courts should consider commercial exploitation when making obscenity determinations. If "the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."¹¹⁴ A ground for regulating materials based on their alleged obscenity assumes that obscene materials are not protected, and cannot well be used to justify denying First Amendment protection to obscene materials.

In support of the "public life and community environment" interest, the Court quoted Professor Alexander Bickel:

[The problem of obscenity] concerns the tone of the society, the mode, or to use the terms that have perhaps greater currency, the style and quality of life, now and in the future. . . . [If a man] demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him this right is to affect the world about the rest of us, and to impinge on other privacies. . . . [W]hat is commonly read and seen and heard and done intrudes upon us all, want it or not.¹¹⁵

The Court assumed that when obscene materials intrude into the day-to-day lives of the population at large, they invade privacy interests and can be regulated.¹¹⁶ Further, the Court adopted Professor Bickel's argument that even discreet public exposure constitutes this sort of invasion. This justification rests the "public life and community environment" interest on the "exposure to unconsenting adults" interest.

Thus, the bedrock of rationales for withholding First Amendment protection from obscene materials is exposure of unconsenting adults and of children. Even Justice Brennan, who by 1973 had concluded

¹¹³ 383 U.S. 463 (1966).

¹¹⁴ *Id.* at 470. See also *Hamling v. United States*, 418 U.S. 87, 130 (1974); *Roth v. United States*, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring).

¹¹⁵ *Paris Adult Theatre I*, 413 U.S. at 59 (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, 22 PUBLIC INTEREST 25, 25-26 (Winter 1971)).

¹¹⁶ This argument features prominently in the Court's determination that broadcasting deserves only the lowest First Amendment protection and that cable transmissions and "dial-a-porn" should be distinguished from broadcasting. See *infra* Parts II.C-D.

that obscene materials should receive First Amendment protection,¹¹⁷ reserved the possibility that regulation might properly be premised on this rationale: "I would hold . . . that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."¹¹⁸

Although the Court explains exposure of unconsenting adults as an intrusion or an invasion of protected privacy,¹¹⁹ the "exposure of children" rationale does not receive much explication in the Court's opinions. In *Ginsberg v. New York*,¹²⁰ the Court held that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate,"¹²¹ and that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"¹²² The Court found two grounds for this interest. First, the authority of parents in their own households "is basic in the structure of our society,"¹²³ and they "are entitled to the support of laws designed to aid discharge of that responsibility."¹²⁴ Second, "[t]he State has an independent interest in the well-being of its youth."¹²⁵ The *Jacobellis* Court "recognize[d] the legitimate and indeed exigent interest of States and localities throughout the Nation in dissemination of material deemed harmful to children,"¹²⁶ without further comment. In *FCC v. Pacifica*,¹²⁷ the Court repeated *Ginsberg's* parental authority language.¹²⁸

The facilitation of parental responsibility seems too weak a ground to justify denial of First Amendment protection to a class of speech, and the only other justification offered by the Court is a naked assertion. The lack of further explication is probably due to the

¹¹⁷ See *Paris Adult Theatre I*, 413 U.S. at 103, 112-13 (Brennan, J., dissenting).

¹¹⁸ *Id.* at 113 (Brennan, J., dissenting). But note that Brennan would not extend the rationale to include remote "exposure," requiring that exposure be "obtrusive." See *id.* at 106-07 (exhibition of films to consenting adults does not implicate the state interest in protecting minors or unconsenting adults); see also *Pope v. Illinois*, 481 U.S. 497, 513 (1987) (Stevens, J., dissenting) ("government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults").

¹¹⁹ The Court has held that in at least some circumstances people have a duty to "avert[] their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

¹²⁰ 390 U.S. 629 (1968).

¹²¹ *Id.* at 639.

¹²² *Id.* at 640-41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

¹²³ *Ginsberg*, 390 U.S. at 639.

¹²⁴ *Id.*

¹²⁵ *Id.* at 640.

¹²⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

¹²⁷ 438 U.S. 726 (1978).

¹²⁸ See *id.* at 749.

Court thinking that the state interest in protecting children really does go without saying. One way to look at the interest in protecting children is to consider it as the same sort of protected privacy interest that unconsenting adults have, asserted paternalistically by the state.

Assuming that the state has a compelling interest in protecting children from obscene materials, what sort of restrictions on obscene material might it justify? The Court held in *Butler v. Michigan*¹²⁹ that the state interest in protecting children from exposure to harmful material did not justify total suppression of the material, which would "reduce the adult population . . . to reading only what is fit for children."¹³⁰ As Justice Frankfurter put it, "[s]urely this is to burn the house to roast the pig."¹³¹ The *Jacobellis* Court reiterated this point immediately following its recognition of the state interest in protecting children from exposure to harmful materials,¹³² quoting *Butler*.¹³³

This Part has examined four rationales offered by the Court for denying First Amendment protection to obscene materials in a public context: public safety, pandering, public life and the community environment, and the exposure of unconsenting adults and children.¹³⁴ The Court's arguments in favor of public safety and pandering, as rationales for denying First Amendment protection to obscene materials, fail for circularity.¹³⁵ The argument for public life and the community environment as a rationale for denying First Amendment protection to obscene materials collapses this rationale into the exposure-of-unconsenting-adults-and-children rationale.¹³⁶ It is thus no surprise that the Court ultimately relies on this rationale as the primary justification for denying First Amendment protection to obscene materials in public contexts. Finally, although these are strong state interests, they have limitations. Regulations intended to protect children must be narrowly drawn so as not to infringe upon the rights of adults, and means of distribution that do not intrude upon the privacy of unconsenting adults may not be "public" at all. Although the Court has interpreted these limitations narrowly, they are nevertheless limitations.

B. First Amendment Issues Presented by On-Line Obscenity

The previous Parts have established several principles of law articulated by the Court in its decisions. First, there is a right to possess

¹²⁹ 352 U.S. 380 (1957).

¹³⁰ *Id.* at 383.

¹³¹ *Id.*

¹³² See *supra* text accompanying note 126.

¹³³ 378 U.S. at 195.

¹³⁴ See *supra* notes 101-33 and accompanying text.

¹³⁵ See *supra* notes 112-14 and accompanying text.

¹³⁶ See *supra* notes 116-18 and accompanying text.

obscene materials in private. Second, this right to private possession is a privacy right protected by the First and Fourteenth Amendments. Third, obscene materials in public contexts are not protected by the First and Fourteenth Amendments. Fourth, the reason that obscene materials are not protected in public is that they intrude upon the privacy rights of unconsenting adults and risk harm to children who might be exposed to them. Fifth, communities should not have their standards set by other communities. Sixth, obscenity is determined according to the *Miller* test, which requires for a finding of obscenity that an average person applying contemporary community standards would find that the work, taken as a whole, both appeals to the prurient interest and is a patently offensive depiction of sexual conduct.¹³⁷ And seventh, the community standards to be applied under the *Miller* test are those of the local community.

There is a tension between the principle that obscene materials should be protected in some contexts and the principle that they should not be protected in other contexts. This Note explicates this tension as a conflict between the privacy rights of people who would view obscene material and the privacy rights of those who would prevent their own, and their children's, exposure to it.¹³⁸ Because each is a protected right, neither can simply eclipse the other. The judicial task is to draw a line between the two protected rights. The Court has drawn this line using a public/private distinction, and has interpreted the distinction to expand the right of those who might be unwillingly exposed, and to contract the right of the willing viewer.

The Court's opinions have put a heavy dialectical load on the public/private distinction, and the strain shows in the difficulty the Court has had in plausibly justifying the degree to which the one right has been contracted and the other expanded. This strain is especially acute in cases in which the risk of public contact with the obscene materials is minimal. Computer-mediated communications present cases that threaten to tax this strained justification beyond its ability to cope.

*United States v. Thomas*¹³⁹ is the most visible (and perhaps the first)¹⁴⁰ on-line obscenity case tried to date, and it raises many of the

¹³⁷ These are necessary, but not sufficient conditions for a finding of obscenity. For the complete *Miller* test, see *supra* Part I.A.2.c.

¹³⁸ A driving force in the obscenity wars is, of course, the desire of some to enforce a public morality by denying to people who would view obscene material the ability to do so, not because of harm to the prohibitionist, but for the willing viewer's own good. The Court has rejected this rationale for censorship. See *supra* Part I.A.1.

¹³⁹ No. CR-94-20019-G (W.D. Tenn. Dec. 13, 1994), *aff'd*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

¹⁴⁰ See, e.g., R. Timothy Muth, *Old Doctrines On a New Frontier: Defamation and Jurisdiction in Cyberspace*, 68 WIS. LAW. 10, 56 (1995) (*Thomas* is "believed to be the first prosecution under [18 U.S.C. § 1465] against the operator of a computer bulletin board"); Faucette,

issues that prove troublesome for the existing conceptual and legal approaches to obscenity law. Robert and Carleen Thomas operated the Amateur Action BBS¹⁴¹ from their home in Milpitas, California. Amateur Action, a "members only" bulletin board system,¹⁴² stored a large collection¹⁴³ of sexually explicit pictures¹⁴⁴ that members could download to their own computers.¹⁴⁵ A postal inspector joined Amateur Action, downloaded pictures in Memphis, and initiated the prosecution of the Thomases in the Western District of Tennessee.¹⁴⁶ The Thomases were unsuccessful in their attempt to transfer the case to the Northern District of California.¹⁴⁷ The Memphis jury, applying Memphis community standards, convicted the Thomases of violating federal obscenity statutes,¹⁴⁸ including six counts of using "a facility and means of interstate commerce, that is a combined computer/tele-

supra note 8, at 1168 (referring to Thomas as "[t]he first successful prosecution for computer-transmitted images"); Pamela A. Huelster, Note, *Cybersex and Community Standards*, 75 B.U. L. REV. 865, 866 (1995) ("This was the first obscenity case in which authorities prosecuted the operators of a computer service using the community standards of the transmission recipient, rather than those of the originator"); *First Conviction for Obscenity on the Internet*, 11 COMPUTER LAW., Sept. 1994, at 29 (referring to Thomas as "reportedly the first-ever federal conviction for transmitting obscenity through the Internet") (note that Amateur Action was a dial-in BBS not connected to the Internet).

¹⁴¹ Bulletin board system. A computer bulletin board is the electronic counterpart to the familiar cork board. Just as with cork boards, some BBSs allow users to post messages, and some restrict posting privileges to the system operator (sysop). Some differences in the legal issues that arise are related to this distinction. For example, a restricted-posting BBS is in some ways similar to a magazine, where the sysop is the publisher. An unrestricted posting BBS, on the other hand, is in some ways similar to a semi-public or public cork board (depending on whether one needs to be a subscriber to read and post or whether the BBS is available to everybody) or to a bookstore. Whether the law holds the sysop liable for damages caused by postings (such as defamation and copyright infringement), and whether it allows the sysop to regulate the content of the BBS, may turn on this distinction.

¹⁴² Members-only BBSs require a password for access. The sysop may charge for access, for connect time, and/or for downloads. Many adult BBS operators require potential members to provide proof of age, such as a driver's license, and to state that they are over 21 and know that they are requesting sexually explicit material. See Huelster, *supra* note 140, at 885.

¹⁴³ Approximately 17,000 images were available to subscribers. See Byassee, *supra* note 5, at 204 n.35.

¹⁴⁴ The materials on the Amateur Action BBS were presumably not obscene by Milpitas community standards. Local police confiscated the Thomases' computer two years before the federal indictment, but returned it saying that the material was not obscene. See Grosso, *supra* note 11, at 484.

¹⁴⁵ See David Landis, *Sex, Laws and Cyberspace; Regulating Porn: Does it Compute?*, USA TODAY, Aug. 9, 1994, at 1D, 2D.

¹⁴⁶ Affidavit in Support of Search Warrant, submitted by Inspector Dirmeyer, Thomas (No. CR-94-20019-G).

¹⁴⁷ Order Denying Motion for Transfer, Thomas (No. CR-94-20019-G).

¹⁴⁸ See *Couple Guilty of Sending Pornography by Computer*, L.A. TIMES, July 29, 1994, at A10; Landis, *supra* note 145, at 15; *Two Convicted in Computer Pornography Case*, N.Y. TIMES, July 29, 1994, at B7.

phone system, for the purpose of transporting obscene material in interstate commerce"¹⁴⁹ in violation of 18 U.S.C. § 1465.¹⁵⁰

On appeal, the Sixth Circuit affirmed.¹⁵¹ The substantive issues considered by the Sixth Circuit were the intangibility of the material, venue, and choice of community standards.¹⁵² The court held that the intangibility issue was decided by congressional intent to prevent the Thomases' conduct,¹⁵³ notwithstanding the absence of statutory

¹⁴⁹ Indictment, Counts 2-7, *Thomas* (No. CR-94-20019-G).

¹⁵⁰ The statute provides in relevant part that:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution . . . any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1465 (1994).

The recently-enacted Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, §§ 501-61, 110 Stat. 56, 133-43, has amended this section of the statute:

TRANSPORTATION FOR PURPOSES OF SALE OR DISTRIBUTION.

The first undesignated paragraph of section 1465 of title 18, United States Code, is amended—(1) by striking "transports in" and inserting "transports or travels in, or uses a facility or means of,"; (2) by inserting "or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce" after "foreign commerce" the first place it appears; (3) by striking ", or knowingly travels in" and all that follows through "obscene material in interstate or foreign commerce," and inserting "of."

Pub. L. No. 104-104, tit. V, § 507, 110 Stat. 56, 137 (1996).

This amendment alters the above-quoted portion of § 1465 to read:

Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.A. § 1465 (West Supp. 1997). The A.C.L.U. and other plaintiffs have challenged the constitutionality of the Communications Decency Act of 1996. See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996) (No. 96-511); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, 65 U.S.L.W. 3362 (U.S. Oct. 15, 1996) (No. 96-595). The challenge reached the Supreme Court on March 19, 1996, see Linda Greenhouse, *Spirited Debate in High Court On Decency Rules for Internet*, N.Y. TIMES, Mar. 20, 1997, at B10, thanks to the expedited review provision of the Act. See Pub. L. No. 104-104, tit. V, § 561, 110 Stat. 56, 142-43 (1996).

¹⁵¹ *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 1774 (1996).

¹⁵² See *id.* at 707, 709-12. The procedural issues addressed by the court were the jury instructions, expert testimony concerning the "prurient interest" of the materials, the admission of uncharged evidence, denial of effective assistance of counsel, and reduction of the Thomases' sentences under the sentencing guidelines. See *id.* at 712-16.

¹⁵³ See *id.* at 707 (citing *United States v. Gilboe*, 684 F.2d 235 (2d Cir. 1982), for the proposition that electronic signals are merely the means by which money is transferred and concluding that wire funds transfers are "transportation" of money). But *Gilboe* is distin-

language dealing with computer-transmitted materials.¹⁵⁴ On the venue challenge, the court held that precedent in the Sixth¹⁵⁵ and Eleventh¹⁵⁶ Circuits establishes violation of 18 U.S.C. § 1465 as a “continuing offense” under the venue provisions of 18 U.S.C. § 3237, allowing prosecution “in any district from, through, or into which” the material travels.¹⁵⁷ As part of its venue analysis, the court considered whether the Thomases knew that material from their bulletin board went to Memphis.¹⁵⁸ The court held that on the facts of this case, the application process¹⁵⁹ put the Thomases on notice that they were sending material to Memphis.¹⁶⁰

If courts read *Thomas* narrowly, it may not apply to a case arising on the Internet and involving a no-membership WWW or FTP site. On the other hand, courts may read *Thomas* broadly for the proposition that on-line providers are liable in any community where their materials can be downloaded.

The decision in *Thomas* is troubling for four reasons. First, even if the decision is limited to its narrow holding, liability in the receiving community will be imposed upon careful on-line providers who try to prevent exposure to unconsenting adults and children, but not upon providers who remain intentionally ignorant.¹⁶¹ Second, an on-line supplier of potentially obscene material may not know, or have the

guishable. The electronic funds transfer is a “zero-sum” transaction—the money disappears from one location and reappears in another. In the usual downloading situation, the original remains on the supplier’s computer.

¹⁵⁴ See *supra* note 150 regarding recent amendments to the statute.

¹⁵⁵ See *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992) (“[v]enue lies in any district in which the offense was committed,”) (quoting *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986)); see also *United States v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981) (“venue for federal obscenity prosecutions lies ‘in any district from, through, or into which’ the allegedly obscene material moves”) (quoting 18 U.S.C. § 3237 (1988)).

¹⁵⁶ See *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982) (“there is no constitutional impediment to the government’s power to prosecute pornography dealers in any district into which the material is sent”) (holding that 18 U.S.C. § 1465 defines the prohibited conduct as a “continuing offense” for purposes of the 18 U.S.C. § 3237 venue provisions).

¹⁵⁷ See *supra* notes 155-56.

¹⁵⁸ See *Thomas*, 74 F.3d at 709-10. See *infra* Part III.C for a discussion of the scienter requirement for obscenity prosecutions.

¹⁵⁹ See *Thomas*, 74 F.3d at 705 (application form with name, address, telephone number, and signature was required to join; Robert Thomas had conversed with Inspector Dirmeyer at his Memphis telephone number).

¹⁶⁰ See *id.* at 709-10.

¹⁶¹ This result is similar to the recent counterintuitive state of on-line defamation law. On-line providers who exercise no editorial control over the contents of their services are treated like “secondary publishers” and are not liable for defamatory contents, see *Cubby Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991), while providers who try to police their content are treated as publishers and are held liable, see *Stratton Oakmont, Inc. v. Prodigy Services*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

ability to know, the destination of files downloaded from his server.¹⁶² This consideration implicates the scienter requirement of criminal law. Third, if on-line providers are subject to prosecution in the recipient's community, the material available on-line will be restricted to that which is acceptable in the least tolerant community. All communities will have their standards set by the least tolerant community, in violation of the fundamental principle that communities should set their own standards. Fourth, the recipient's right to possess obscene materials in private will be restricted even though there is no risk to the countervailing privacy interests of unconsenting adults and children. The Court's public/private distinction cannot plausibly stretch its justifying principles this far.

The *Thomas* decision indicates that the Western District of Tennessee implicitly or explicitly conceptualized the transactions charged in counts two to seven as sendings analogous to mailings. This postal paradigm is an inappropriate analogy for the most common cases of on-line transfers of potentially obscene material, downloading by willing viewers.

II

IS A NEW LEGAL PARADIGM NECESSARY?

On-line obscenity prosecutions raise two basic First Amendment questions. First, which is the proper community by whose standards to judge on-line obscenity? And second, how should the law conceptualize on-line transactions? One's answer to the first question depends upon one's answer to the second.

A third question is sometimes asked: How should the law conceptualize the on-line environment? Those who ask this question generally claim that no existing legal conceptualization or paradigm is up to the task of deciding cases in the on-line environment, and that consequently a new conceptualization is necessary. This view suffers from the very defect it identifies in the existing paradigms. Because the on-line environment is so diverse, no single paradigm can apply to the whole environment and all the transactions that occur within it. Some on-line actors resemble common carriers, some resemble publishers, and others resemble bookstores, readers, handbillers, or soapbox preachers. Furthermore, a single actor may resemble a common car-

¹⁶² See *infra* Part IV; Byassee, *supra* note 5, at 211 ("[a]lthough the BBS operator may set his equipment to allow [automatic downloads], and is aware that out-of-state subscribers are likely to download various files, a fundamental distinction exists between this preparatory activity and the affirmative action of initiating the actual transportation"); Huelster, *supra* note 140, at 870 (operator of on-line service "maintains no control over the destination of the information"); Symposium, *First Amendment and the Media*, *supra* note 8, at 254 (on-line supplier cannot decide where to distribute materials).

rier with respect to some of its on-line transactions, and a publisher or a bookstore with respect to others. Although those who call for a new conceptualization of the on-line environment are correct to claim that no existing legal paradigm can adequately frame all the conflicts that will arise on-line, they are incorrect to think that any single paradigm is up to the task. No single paradigm can even adequately account for all on-line transfers of potentially obscene material.

This Note suggests a transactional approach instead. A court using this method inquires into the character of the particular transaction and uses the legal paradigm appropriate to this character. It may be that some possible on-line transactions cannot successfully be characterized according to existing paradigms. In these cases, courts will need to develop new conceptualizations. But on-line transfers of potentially obscene material by willing viewers are not such cases. They are properly analogized to cases where the recipient travels to the supplier's location and returns home with the material.

This Part, then, focuses on the question of what legal paradigm courts should apply at the transactional level to computer-mediated transfers of potentially obscene material to willing viewers.

Courts have several conceptualizations available within which to try to fit on-line obscenity cases. They can analogize the on-line transfer of allegedly obscene material to sending such material through the mail, distributing it in magazines, broadcasting it, cablecasting it, communicating it by telephone, and posting it in public places. On-line transfers share certain characteristics with each of these existing methods of conveying potentially obscene material. The similarities invite lawyers, judges, and legal academics to apply the existing law governing these methods of conveyance to cases arising in the on-line context. The differences between on-line transfers to willing viewers and each of the conventional methods of distribution are sufficiently great that the result of such a project would be malformed and uncertain law and incorrect decisions.¹⁶³ The conceptual frameworks upon which the law governing the conventional methods of distribution are based are not apt characterizations of this kind of on-line transaction.

First, Parts II.A-D examine computer-mediated transfers of potentially obscene material through several conceptualizations now available in American law, which have been suggested as appropriate paradigms for deciding on-line obscenity cases. It concludes that

¹⁶³ Note that incorrect decisions are possible both in the on-line cases themselves, which may be assimilated only poorly into an existing area of law, and in conventional cases once the law has been adjusted to include on-line cases. Future broadcasting cases that would be correctly decided under broadcasting law as it has developed, for example, might be decided incorrectly under broadcasting law as it came to be extended to accommodate on-line cases.

there are serious objections to each of them. Next, Part II.E examines several conceptualizations that have recently been advanced for deciding on-line obscenity cases, and which are not currently available in American law, concluding again that there are serious objections to each of them. Finally, Part II.F identifies another conceptual framework currently available in American law, though rarely suggested as an analogy appropriate for on-line obscenity cases.¹⁶⁴ Part III argues (1) that this paradigm is an apt characterization of on-line transfers of allegedly obscene materials to willing viewers, and (2) that this conceptual framework is, among the surveyed alternatives, uniquely in harmony with the legal principles underlying existing obscenity law, in particular the protection afforded to private possession of obscene materials by *Stanley v. Georgia*¹⁶⁵ and the principle that communities should set their own standards.

A. The Postal Paradigm

Many early obscenity prosecutions involved the sending of potentially obscene material through the mail. As obscenity jurisprudence developed, it was natural to apply the law created in the postal context to sendings generally. The postal paradigm is implicit in the *Thomas* decision. But the analogy fails when it is applied to the usual sort of on-line transactions.

The postal paradigm can be characterized by three criteria. First, there is an identifiable sender who acts affirmatively to transport material to a particular recipient. Second, the sender is aware of the identity and location of the recipient. Third, the material is entrusted to a third party for transportation.¹⁶⁶ All three criteria distinguish postal transactions from on-line transfers.

The first criterion does not apply to file servers in general. Servers do not initiate transfers or act affirmatively with intent. They respond automatically to requests for data.¹⁶⁷ It might be argued that the server does what it is programmed to do, and that the intent and affirmative action of the owner of the server¹⁶⁸ are reflected in its pro-

¹⁶⁴ See *supra* note 12 and accompanying text.

¹⁶⁵ 394 U.S. 557 (1969).

¹⁶⁶ A fourth criterion was, originally, that the third party (i.e., the Post Office) had a special relationship with the government. Early federal obscenity statutes were based on the postal power. As obscenity law developed, the identity of the transporting agent became less important. The third party now need not have a special relationship with the government. Current federal law criminalizes transportation of obscene materials. See 18 U.S.C. § 1465 (1994). If such provisions are considered to be within the postal paradigm, then the third-party criterion is also not part of the paradigm as it exists today.

¹⁶⁷ See Byassee, *supra* note 5, at 211 (noting that BBSs accept calls and send files automatically, without the "intervention, presence, or knowledge of the BBS operator").

¹⁶⁸ For simplicity this account assumes that the server owner is the sender of the material. In the *Thomas* case this is largely true. Robert Thomas organized the image files

gramming. Furthermore, one could argue that the mail-order merchant is responding to the request of the recipient just as the server is. Accepting this as true, still, the intent and affirmative action demonstrated in the case of the server are not directed towards transporting material to a particular recipient.¹⁶⁹ The mail-order merchant can choose not to send material to a certain individual or into a certain community, but the server owner cannot make this choice.¹⁷⁰ Judged by the server owner's intent and action, the server is more closely analogous to a walk-in bookstore than to a catalog merchant.¹⁷¹ Furthermore, the server owner is often not in a position to know the identity or the location of the recipient. A World Wide Web (WWW) or anonymous File Transfer Protocol (FTP) site on the Internet, for example, may have difficulty even knowing whether a particular contact originates within the United States.¹⁷² Even a members-only BBS with a strict application and verification process knows only the identity of the recipient. Once a password is issued, it can be used from anywhere. Finally, it is not clear that the material is entrusted to a third party for transport in the on-line context.¹⁷³

B. The Print Paradigm

The characterizing criteria for the publishing paradigm are (1) editorial control over the material and (2) control over the geographic extent of distribution. The first criterion is not present in some on-line transfers of potentially obscene material to willing recipients. Many BBSs and newsgroups, for example, allow postings by any user.¹⁷⁴ The more telling distinction is the second. Publishers can tailor material for different communities, and can avoid sending mate-

and created labels for them on a dial-up server which the Thomases owned. Most Internet content providers do not own their own servers, however. They rent storage space on a server owned by an Internet access provider. And some "content providers" merely provide storage for material uploaded by other users. Determining who the sender is for purposes of criminal liability in these cases is not trivial.

¹⁶⁹ See Byassee, *supra* note 5, at 211 (arguing that "a fundamental distinction exists between this preparatory activity and the affirmative action of initiating the actual transportation").

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² The Massachusetts Institute of Technology FTP server, from which one can download PGP encryption software, denies access from non-U.S. addresses because the encryption algorithm is not approved for export by the State Department. The determination is made according to the Internet address of the party who wishes to download, and the server denies access to so many U.S. addresses that the access instructions state the procedure for requesting manual intervention.

¹⁷³ This criterion may not be part of the postal paradigm as it exists today. See *supra* note 166 and accompanying text.

¹⁷⁴ Of course, the posting user might be considered a publisher in these cases.

rial into communities where the risk is high that it would be judged obscene. On-line suppliers do not have this ability:

A conventional publisher can decide where to distribute his materials, and if the materials include sexual matter, he can avoid communities where the standards are less tolerant. By definition, materials that are distributed through cyberspace cannot be limited in the same way. Thus, in this context, there is a fundamental difference in the nature of the medium.¹⁷⁵

C. The Broadcasting and Dial-a-Porn Paradigms¹⁷⁶

Broadcasting receives "the lowest level of First Amendment protection"¹⁷⁷ because it is a "uniquely pervasive presence" in American life.¹⁷⁸ In essence, broadcasting is per se public by virtue of its inescapably intrusive nature. This intrusive nature is the characterizing criterion for the broadcast paradigm.

In *FCC v. Pacifica Foundation*,¹⁷⁹ the Court emphasized the narrowness of its holding: "This case does not involve a two-way radio conversation between a cab driver and a dispatcher . . ."¹⁸⁰ The question is where the "per se public" line should be drawn between the privacy rights of willing recipients and those of unconsenting adults and children. The Court has considered the boundary between intrusion and protection in "dial-a-porn" cases. In *Sable v. FCC*,¹⁸¹ a dial-a-porn service challenged the 1988 amendments to 47 U.S.C. § 223(b), which imposed a ban on indecent and obscene commercial interstate telephone communications. The Court distinguished dial-a-porn from broadcasting, holding that telephone messages are not pervasive in virtue of the affirmative action of the recipient:

The *Pacifica* opinion . . . relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without warning as to program content, and is "uniquely accessible to children, even those too young to read." The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires

¹⁷⁵ Symposium, *First Amendment and the Media*, *supra* note 8, at 254.

¹⁷⁶ Note that broadcasting cases involve indecent communications or materials, not obscene materials. The per se public, intrusive nature of broadcasting resolves the obscenity question in favor of the privacy rights of unconsenting adults and children.

¹⁷⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁷⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978). Other factors include the public ownership of a scarce resource, *viz.* the airwaves.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 750.

¹⁸¹ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. . . . [T]he message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.¹⁸²

Although the Court upheld the "obscene communications" provision of the statute,¹⁸³ the logic the Court used suffers from the same circularity discussed in Part I.A.2.d. If dial-a-porn is not public, which the Court found, then even obscene messages should be protected because the criterion for protection is the public/private distinction.

The Court's holding could be defended by a distinction of degree: On this view, dial-a-porn is "private" enough that indecency is protected, but "public" enough that obscenity is not. Alternatively, one might claim that the Court's view is that dial-a-porn is private but for the pandering that accompanies its commercialization.

On either view, willing viewers downloading potentially obscene materials on-line can be distinguished from obscene dial-a-porn. First, the on-line context is substantially more private than the telephone context. If an unconsenting listener came across dial-a-porn by accident—for example, by misdialing or through crosswiring by the phone company—the message would be immediately intelligible and offensive. If, on the other hand, an unconsenting viewer were accidentally sent potentially obscene materials on-line, all he would have is a computer file which would still require affirmative action and proper decoding software to view. Recognizing the file as misdirected, the potential viewer need only discard it without viewing it. On the second view, only commercially pandered materials on-line would be considered public.

D. The Public Posting Paradigm

Another means of distributing potentially obscene material would be to post it publicly. *Ex hypothesi*, the characteristic of this method is its public nature. The paradigm is mentioned here because the pre-analytic notion of a computer bulletin board system might suggest public posting as a viable paradigm.

¹⁸² *Id.* at 127-28 (striking the "indecent communications" provisions of 47 U.S.C. § 223(b) (1988)).

¹⁸³ *See id.* at 124 (on the ground that obscene speech is not protected by the First Amendment).

The Court has held that commercial speech using the advertising space on bus walls has a similar "captive audience" problem to broadcasting.¹⁸⁴ There is every reason to believe that the Court would find public posting similarly intrusive into the privacy of unconsenting adults. For the reasons discussed in Parts III.A and III.C, willing viewers downloading potentially obscene materials from on-line sources do not conform to this paradigm.

E. Paradigms Not Currently Available in American Law

1. *National Obscenity Standard*

The increase in on-line activity has focused attention on First Amendment issues in the on-line context. Some commentators have responded to the controversy over potentially obscene materials on-line by advocating a national obscenity standard for on-line speech.¹⁸⁵

This approach is not currently available since *Miller* and its progeny specified the local community standard.¹⁸⁶ However, the local standards decisions were announced over twenty years ago by bare majorities of the Court. Perhaps the issue should be reopened. This Part argues that a national standard is both undesirable and unlikely.

Part I.A.2.c notes that jurists of opposing ideologies seem to agree on the principle that communities should not have their standards dictated by other communities. Furthermore, as long as community standards are heterogeneous across the country, no single standard can avoid violating this principle. Therefore, as a matter of principle, jurists should prefer local standards.

But obscenity is not merely a legal issue; it is a political issue as well. Perhaps legislators could impose a national standard.¹⁸⁷ This is unlikely, because legislators will not support a national standard unless it draws the line near where they think it ought to be. The same heterogeneity that makes a national standard a bad idea in principle also makes it an unlikely political solution.

¹⁸⁴ See *TRIBE*, *supra* note 2, § 12-19, at 949 n.24. *But see* *Cohen v. California*, 403 U.S. 15 (1971) (holding that in the case of political speech consisting of the words "Fuck the Draft" emblazoned on a jacket, unconsenting viewers had a duty to avert their eyes).

¹⁸⁵ See, e.g., Symposium, *First Amendment and the Media*, *supra* note 8, at 254 (advocating either a national obscenity standard or the use of the "cyber-community" for community standards analysis); Chiu, *supra* note 8, at 189 (advocating a national obscenity standard); Goldman, *supra* note 8, at 1104-05 (arguing that "[d]ropping the 'community standards' prong of the *Miller* test seems the obvious solution for a medium such as the Internet"); Kim, *supra* note 8, at 430, 441 (suggesting, *inter alia*, either a national obscenity standard or a national *per se* obscenity rule).

¹⁸⁶ See *supra* Part I.A.2.c.

¹⁸⁷ If they did, the Court might still find that the principle that communities should not have their standards dictated by other communities has constitutional dimensions.

2. *Virtual Community Standard*

Perhaps the most interesting suggestion in the on-line obscenity debate is the idea that the appropriate community for community standards analysis is the cyber-community itself.¹⁸⁸ This notion is the strong cyber-community thesis.¹⁸⁹

The idea is that on-line computer users form a sufficiently robust community to be recognized by the law, at least for purposes of the *Miller* obscenity analysis. There is a certain plausibility to this claim that would be lacking in an analogous claim made by magazine readers, broadcast listeners, cable subscribers, postal customers, telephone users, or handbillers. This plausibility is a result of the inherent privacy of the user/computer relationship. This privacy isolates the computer user from his or her geographic community, and imparts a feeling of participation in a self-sufficient on-line community. This Part argues that the privacy of the user/computer relationship is insufficient to establish the strong cyber-community thesis. Part III argues that it is sufficient at least to limit the liability of on-line suppliers of potentially obscene material to their own geographical communities.

The first difficulty with the strong cyber-community thesis is that it asks us to consider the computer user as no longer a part of his or her geographic community while on-line. The intuitive plausibility of the cyber-community thesis is grounded in the fact that the user is withdrawn from his or her geographic community while on-line; but withdrawal falls short of absence, and the strong cyber-community theorist needs the user's absence from his or her geographic community to motivate the theory. If the user remains part of his or her geographic community while on-line, the strong cyber-community theorist has not shown that the user's geographic community is an improper venue for prosecution.

The second difficulty is justifying the scope of the on-line community. Some on-line users use e-mail exclusively; others use commercial

¹⁸⁸ See, e.g., Branscomb, *supra* note 8, at 1652-54 (asserting the independence of the "virtual community" of computer-mediated communicators from geographical communities and arguing that the virtual community's standards should govern an obscenity analysis, at least where no harmful consequences can be demonstrated in a geographical community); Byassee, *supra* note 5, at 210 ("the computer user's interaction transcends the local community because that user, from the privacy of her own home, is participating in a community for which geographical bounds are irrelevant. The physical conduct of using the computer—of connecting to cyberspace—may occur in a physical location, but that is not the conduct to which the community standards test applies."); Godwin, *supra* note 8, at 8 (advocating use of the "cyber-community" for community standards analysis); Symposium, *First Amendment and the Media*, *supra* note 8, at 255 (advocating either a national obscenity standard or the use of the "cyber-community" for community standards analysis); Kim, *supra* note 8, at 430 (advocating use of the virtual community for community standards analysis).

¹⁸⁹ See *supra* Part I.A.2.c.

services, the World Wide Web, dial-up BBSs, or the Internet exclusively; many others use a variety of on-line services. Why shouldn't each service, or even each newsgroup, have its own community?

The third difficulty is preventing a proliferation of alternative communities. If on-line computer users are entitled to have their speech evaluated by the standards of a cyber-community, why shouldn't other "withdrawn" communities be recognized? And if non-geographical communities are recognized for *Miller* analysis, why shouldn't they be recognized for other legal purposes as well?

A practical concern is also worth noting. The strong cyber-community thesis is frequently advanced by confirmed libertarians,¹⁹⁰ presumably in view of the early on-line community's near-anarchic commitment to libertarianism. But as the on-line community grows, its political center is changing as well. Those who advocate the cyber-community today must be prepared to live with it when the moral majority joins.

F. The Traveling-To-Obtain Paradigm

Willing viewers downloading potentially obscene materials from on-line sources are best analogized to willing viewers who travel to another community, buy the materials, and return home. This paradigm is superior to the alternatives in several ways. First, it respects the fundamental principles of obscenity law: (1) the privacy principle, and (2) the principle that communities should set their own standards. Furthermore, (3) it is consistent with the scienter requirement of criminal law; and (4) it avoids inequitable results. Part III develops this view.

III

WHICH COMMUNITY'S STANDARDS SHOULD GOVERN ON-LINE TRANSFERS?

The question of which community's standards should apply to on-line transfers of potentially obscene material can itself be divided into two questions: (1) is the on-line community (the so-called "cyber-community") the proper community by whose standards to judge on-line obscenity?, and (2) if the cyber-community is not the proper community, which of the geographical communities is proper (assuming that the supplier and the recipient inhabit different geographical communities)?

Question (1) is unique to the on-line domain, and there are two versions of the cyber-community thesis. The "strong" or "positive" ver-

¹⁹⁰ The Electronic Frontier Foundation, a private, nonprofit organization concerned with civil liberties and telecommunications issues, is one prominent example.

sion asserts that there is a cyber-community which should be recognized by the law.¹⁹¹ Proponents of this view argue that transactions on-line take place in this community alone; while the computer user is on-line, he or she is a member of the cyber-community and should be governed by its rules and customs, including its community standards.¹⁹² Magazine purchasers, broadcast listeners, cable subscribers, postal customers, telephone users, and handbillers can hardly claim to belong to an exclusive community apart from their geographical community. But the isolated and private nature of computer communication, as it is normally practiced, lends an air of plausibility to this claim. Part II.E.2 argues that this air of plausibility is insufficient to establish the theory as a doctrine of law.

The weaker, "negative" version does not advocate the literal existence of a non-geographical community. It asserts that on-line interaction does not touch any geographical community, and that therefore no geographical community's standards can apply because no geographical community is affected.¹⁹³ Although the strong version of the cyber-community thesis postulates a new entity which should be recognized by the law, the weak version simply denies that on-line transactions are part of the user's geographical community. In this respect it is a privacy argument, and it is relevant to the issue of First Amendment protection for obscene materials in the on-line context under this Note's analysis, which displays the protection issue as a conflict of privacy rights.¹⁹⁴ If the weak cyber-community argument succeeds, the on-line context is not a public but a private context, and obscene materials would enjoy First and Fourteenth Amendment protection on-line just as they do in the privacy of the home.

Question (2) is not unique to on-line obscenity cases. Whether the allegedly obscene material was mailed, received over the airwaves or on cable, purchased at a newsstand, or spoken over the phone, the sender can always ask why he should be subject to the standards of a community to which he does not belong. In the conventional cases, the law answers that the community into which the material was transported has been touched by the material, and that the sender can be held liable for the offensive contact.

A defendant might respond by borrowing the "no contact" argument from the proponent of the weak cyber-community thesis. If he can make good the argument that on-line interaction is fundamen-

¹⁹¹ See Branscomb, *supra* note 8, 1252-54; Godwin, *supra* note 8, at 8; and Kim, *supra* note 8, at 430.

¹⁹² See Branscomb, *supra* note 8, 1252-54; Godwin, *supra* note 8, at 8; and Kim, *supra* note 8, at 430.

¹⁹³ See, e.g., Byassee, *supra* note 5, at 208-09.

¹⁹⁴ See discussion *supra* Part I.B.

tally different from the conventional means of distribution, the rationale upon which the liability of a sender in the receiving community is predicated is undermined.

If this argument succeeds, the result is not that obscene materials enjoy the same First Amendment protection on-line that they do in the home, but that the community whose standards apply to on-line providers of potentially obscene material is the community where the provider is located. This argument is made good by the fact that on-line transactions more closely resemble the recipient traveling to the provider's location and returning with the allegedly obscene material than they resemble any of the conventional means of distribution. This view has the virtue of being consistent with the privacy-based right to possess obscene materials at home,¹⁹⁵ as well as the other fundamental principles underlying obscenity law.

A. The Privacy Rationale

This Note has developed a view of obscenity jurisprudence grounded on the conflicting privacy rights of those who would view obscene materials and those who would prevent their own, and their children's, exposure to it.¹⁹⁶ Although the Court has shaded the line between the respective privacy rights beyond the plausible boundaries of the privacy foundation,¹⁹⁷ in the end the Court will not be able to abandon the right to possess obscene materials in private.¹⁹⁸ If this is correct, the right to possess obscene materials in private should extend at least far enough to protect activity that does not threaten the competing privacy rights of unconsenting adults and children, because there the rationality of regulation stops.

The technology of computer-mediated communications has made it possible to deliver potentially obscene materials into the privacy of the home without even the near-fiction of a risk of intrusive exposure to unconsenting adults and children. At this point, the right to possess obscene materials in the privacy of the home should protect potentially obscene materials.

B. The Local Standards Rationale

Because on-line communication ignores geography to the extent that one user cannot be sure where another user is,¹⁹⁹ the application of local community standards in the on-line context actually *defeats* the ability of local communities to set their own standards. It imposes the

¹⁹⁵ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹⁹⁶ See *supra* Part I.B.

¹⁹⁷ See *supra* Part I.B.

¹⁹⁸ See *supra* Part I.A.1.

¹⁹⁹ See *infra* Part IV; *supra* note 162 and accompanying text.

standards of the least-tolerant community on all communities. But the local community standards rationale is sound.²⁰⁰

To preserve the basic principle that communities should set their own standards, the alternatives are (1) to accept the cyber-community thesis and deny that any geographic community's standards apply to on-line transfers; or (2) to hold on-line suppliers of potentially obscene material to their local community standards. Otherwise, (3) the Court must abandon the local standards principle. The first approach is undesirable because it is implausible to think that computer users are absent from their geographic communities when they are on-line, and because it is hard to see why there should be exactly one such community that comprises all and only cyberspace. The third approach is objectionable because the local community standards principle is a fundamental principle of obscenity jurisprudence and of the American way of life. The second alternative is best because it respects common sense and legal doctrine (which the first alternative does not do), and because it respects the fundamental constitutional principles underlying obscenity law (which the third alternative does not do).

Holding on-line suppliers of potentially obscene material to their local community standards is precisely the result achieved by considering on-line downloading of potentially obscene materials by willing viewers to be analogous to traveling to purchase the material. The San Francisco bookstore must meet the San Francisco community standard for obscenity. A Memphis resident can travel to San Francisco, purchase the materials at the bookstore, and return to Memphis. Assuming he or she makes it back to the privacy of his or her home without incident, Memphis authorities are powerless to prosecute. And if for some reason the materials did contact the Memphis community,²⁰¹ action would lie against the traveler and not against the bookstore. From the standpoint of fundamental constitutional principles and from the standpoint of equity in the particular case, this result is the correct one.

The on-line case is analyzed in exactly the same way. The Memphis computer user travels on the "information superhighway" to San Francisco and returns with potentially obscene materials. As long as the materials are viewed in private, they are protected. If they contact the Memphis community, legal action lies against the Memphis resident and not against the supplier.

The on-line transaction that produces this result is the common case of an on-line download by a willing viewer. On the transactional

²⁰⁰ See *supra* Parts I.A.2.d, II.E.1.

²⁰¹ If they fell out of the traveler's bag at the airport, or blew out the window of the car, for example.

analysis, the result may be different for other on-line transactions. If the San Francisco supplier conducted a bulk e-mailing with samples of the available material, for example, he or she might be liable in the receiving communities on the ground of intrusion into the privacy of unconsenting recipients.

C. Scienter

Scienter is the term "used in pleading to signify an allegation . . . setting out the defendant's previous knowledge of the cause which led to the injury complained of. . . . [It] is frequently used to signify the defendant's guilty knowledge."²⁰² Obscenity prosecutions require scienter; an obscenity statute cannot be a strict liability offense.²⁰³ The Court stated in *Hamling v. United States*²⁰⁴ that obscenity prosecutions require knowledge of the content of the materials, not knowledge of whether the materials are obscene.²⁰⁵ Scienter is necessary "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."²⁰⁶

Recently, the Court held that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."²⁰⁷ In fact, "some form of scienter is to be implied in a criminal statute even if not expressed;"²⁰⁸ the Court "interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."²⁰⁹

Under *United States v. X-Citement Video*,²¹⁰ obscenity statutes which require that the defendant knowingly transport materials in interstate commerce,²¹¹ for example, may not be applicable to on-line suppliers. In its analysis of venue in *Thomas*, the Sixth Circuit held that the application submitted by Inspector Dirmeyer for an Amateur Action BBS password, which involved submitting a signed form including his age, address, and telephone number, taken together with telephone conversations Thomas had with Dirmeyer, constituted knowledge sufficient both for venue and for the offense. The Court stated as dictum

²⁰² BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

²⁰³ See *Smith v. California*, 361 U.S. 147 (1959).

²⁰⁴ 418 U.S. 87 (1974).

²⁰⁵ See *id.* at 119-21; see also *Mishkin v. New York*, 383 U.S. 502, 510 (1966); *Smith*, 361 U.S. 147 (1959) (knowledge of contents necessary for criminal liability); *Rosen v. United States*, 161 U.S. 29, 41 (1896).

²⁰⁶ *Mishkin*, 383 U.S. at 511.

²⁰⁷ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

²⁰⁸ *Id.* at 69.

²⁰⁹ *Id.* at 70.

²¹⁰ 115 S. Ct. 464 (1994).

²¹¹ See, e.g., 18 U.S.C. § 1465 (1994).

that "Section 1465 does not require the Government to prove that Defendants had specific knowledge of the destination of each transmittal at the time it occurred."²¹²

The Sixth Circuit seems to imply that the Thomases were convicted by the very effort they took to prevent contact between the potentially obscene materials on their BBS and consenting adults or minors. A non-profit anonymous FTP site on the Internet, for example, is distinguishable on the holding²¹³ in *Thomas*.

IV

CHALLENGES TO THE COMMUNICATIONS DECENCY ACT— FINDINGS OF FACT

This Note has argued that the most common on-line transfers of potentially obscene material to willing viewers relevantly resemble the recipient traveling to the supplier's location, obtaining the material, and returning to his home jurisdiction.²¹⁴ Further, these transfers are relevantly distinguishable from the supplier mailing such material to the recipient.²¹⁵ This Note has also argued that making potentially obscene material available on-line is not a "pervasive" dissemination of the material, and that for purposes of the Court's public/private distinction the on-line context is analogous to "dial-a-porn" and not to broadcasting.²¹⁶ Both arguments involve factual premises about on-line communications, and therefore they are both potentially vulnerable to factual arguments. A court might find as a matter of fact that on-line distribution is "pervasive" or that the common transfers of potentially obscene material resemble mailings rather than travelings. Recent challenges²¹⁷ to the Communications Decency Act²¹⁸ have caused two federal three-judge panels to make extensive findings of fact which support the analysis of this Note.

Section 502 of the Communications Decency Act amends 47 U.S.C. § 223 to prohibit, *inter alia*, (1) the use of a telecommunications device to send obscene or indecent material with intent to harass, annoy, abuse, or threaten; (2) the use of a telecommunications device to send obscene or indecent material to a minor; (3) the use of

²¹² *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

²¹³ Perhaps it could be distinguished even on the dictum. The court's statement was in its venue analysis, and the scienter requirement involves an element of the crime, not a venue provision.

²¹⁴ See *supra* Parts II.F. and III.

²¹⁵ See *supra* Parts II.F. and III.

²¹⁶ See *supra* Part II.C.

²¹⁷ See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996) (No. 96-511); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, 65 U.S.L.W. 3362 (U.S. Oct. 15, 1996) (No. 96-595).

²¹⁸ The Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, §§ 501-61, 110 Stat. 56.

a computer to send obscene material to a minor; and (4) permitting a telecommunications facility under one's control to be used for any of the above purposes, with intent that it be so used.²¹⁹ Section 507 amends 18 U.S.C. §§ 1462 and 1465 to include on-line transfers explicitly in their prohibitions.²²⁰

Although it might appear that these provisions of the Communications Decency Act would affect on-line obscenity jurisprudence substantially, closer scrutiny reveals that this is not the case. Section 507 is titled "Clarification of current laws regarding communication of obscene materials through the use of computers."²²¹ Because courts have applied 18 U.S.C. §§ 1462 and 1465 to on-line transfers already, the changes due to § 507 have no practical effect except to prevent future Circuit splits in the unlikely event that a court in a Circuit where the issue had not been addressed would otherwise decide not to apply the federal obscenity laws to computer-mediated communications. The amended laws, like existing obscenity jurisprudence, leave open the question of which community's standards to apply. As its title states, § 507 merely clarifies existing federal obscenity law, and it does so without addressing the question raised in this Note.

Similarly, § 502 of the Communications Decency Act does not have any practical impact on obscenity jurisprudence. Because 18 U.S.C. §§ 1462 and 1465 (both before and after the amendments of § 507) prohibit the transfer of obscene materials using computer-mediated communications regardless of the intent of the sender or the age of the recipient, the provisions of § 507 add nothing to existing obscenity jurisprudence.

Although the Communications Decency Act does not change federal obscenity jurisprudence, it does affect computer-mediated communications by prohibiting the transfer of "indecent" material (1) with intent to harass, annoy, abuse, or threaten, or (2) to a minor.²²² These indecency provisions have been attacked as unconstitutional.²²³ The Communications Decency Act contains an expedited review provision,²²⁴ calling for a hearing by a three-judge District Court pursuant to 28 U.S.C. § 2284 and Supreme Court review of a finding of unconstitutionality as a matter of right. Two three-judge courts have en-

²¹⁹ See § 502, 110 Stat. at 133 (1996).

²²⁰ See § 507, 110 Stat. at 137 (1996).

²²¹ See *id.*

²²² See § 502, 110 Stat. at 133 (1996).

²²³ See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996) (No. 96-511); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, 65 U.S.L.W. 3362 (U.S. Oct. 15, 1996) (No. 96-595).

²²⁴ See § 561, 110 Stat. at 142 (1996).

joined enforcement of the indecency provisions.²²⁵ The Eastern District of Pennsylvania has enjoined enforcement of the prohibitions against (1) the use of a telecommunications device to send indecent material to a minor; (2) the use of a computer to send indecent material to a minor; and (3) permitting a telecommunications facility under one's control to be used for either of the above purposes, finding the provisions both overbroad and vague.²²⁶ The Southern District of New York has enjoined enforcement of the prohibition against the use of a computer to send indecent material to a minor, finding the provision overbroad.²²⁷ The Court heard *ACLU* on March 19, 1997,²²⁸ and an appeal has been filed in *Shea*.²²⁹ Commentators expect the Court to affirm the decisions.²³⁰

Both three-judge panels conducted extensive evidentiary hearings, and both devoted large parts of their opinions to findings of fact that are important for on-line obscenity jurisprudence and that strongly support the analysis of this Note.²³¹ It is significant that both courts found virtually identical facts, because it would be hard for the Supreme Court to reject facts upon which two independent three-judge panels agree. It appears that the facts found in *Shea* and *ACLU* are destined to receive the imprimatur of the Supreme Court and to become the facts upon which on-line obscenity jurisprudence is based.

Some of courts' noteworthy findings are: (1) The Internet operates with no organizational oversight, and thus no responsible entity.²³² (2) The Internet does not "invade" homes or "assault" users as broadcasts do; viewing adult material requires affirmative steps that distinguish on-line suppliers from broadcasters.²³³ (3) The risk of accidental exposure to adult material is not sufficient to justify regulation.²³⁴ (4) Technical considerations do not allow Internet "publishers" to restrict access by geographic areas or by age, or even to

²²⁵ See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3414 (U.S. Dec. 6, 1996) (No. 96-511); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, 65 U.S.L.W. 3362 (U.S. Oct. 15, 1996) (No. 96-595).

²²⁶ See *ACLU v. Reno*, 929 F. Supp. at 883. The panel voted 3-0 on overbreadth; Judge Dalzell did not consider the provisions vague. *Id.* at 867 n.2.

²²⁷ See *Shea v. Reno*, 930 F. Supp. at 939-50.

²²⁸ See Greenhouse, *supra* note 150, at B10.

²²⁹ See *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *cert. filed*, 65 U.S.L.W. 3362 (U.S. Oct. 15, 1996) (No. 96-595).

²³⁰ See Ronald J. Hansen, *Ground-breaking cyberspace case near?*, RICHMOND TIMES-DISPATCH, Dec. 26, 1996, at E-5 (quoting Robert M. O'Neil, University of Virginia law professor).

²³¹ The findings of fact comprise approximately one-third of each opinion. *ACLU v. Reno* contains 123 numbered paragraphs of findings, many of which identify more than one fact.

²³² See *ACLU v. Reno*, 929 F. Supp. at 832; *Shea v. Reno*, 930 F. Supp. at 926.

²³³ See *ACLU v. Reno*, 929 F. Supp. at 944-45; *Shea v. Reno*, 930 F. Supp. at 930-31.

²³⁴ See *ACLU v. Reno*, 929 F. Supp. at 844-45; *Shea v. Reno*, 930 F. Supp. at 930-31.

know the identity, age, or location of a recipient of their material.²³⁵ (5) Foreign sites account for a substantial part of the adult content on the Internet.²³⁶ Both panels endorsed various software blocking and monitoring programs that allow parents to supervise their children's Internet access,²³⁷ which are also the Internet community's preferred solution to obscenity and indecency issues on-line.

Facts (2) and (3) appear to place the Internet firmly among "non-pervasive" media like "dial-a-porn" rather than among "pervasive" media like broadcasting for First Amendment purposes. Permissible regulation must not interfere with adults' access to material, and if the least restrictive means of regulation available are still unreasonable, the government may not regulate at all.²³⁸ Fact (4) supports this Note's argument that the most common on-line transfers of potentially obscene material are like the recipient traveling to the supplier's location and returning with the material, and unlike either (a) the supplier mailing the material to the recipient or (b) the supplier publishing and distributing a magazine. The on-line supplier of potentially obscene material, who cannot know the identity, age, or residence of recipients, and who cannot restrict distribution accordingly, is like a bookstore dealing with a walk-in customer, and unlike both a mail-order merchant who knows the identity and address of the recipient, and a magazine publisher who can choose not to distribute his products in certain jurisdictions.

Although the Communications Decency Act has no direct, statutory impact on on-line obscenity jurisprudence, the attacks on its constitutionality will have a marked indirect effect. The facts about computer-mediated communications found by the two three-judge panels, which will very likely receive the Supreme Court's imprimatur when the Court reviews the decisions,²³⁹ will guide the future development of on-line obscenity jurisprudence. These facts distinguish common on-line transfers of potentially obscene material from both mailings and magazine distributions, and support the argument of this Note that courts should analogize the on-line transfers to traveling to the supplier's location and returning with the material rather than to mailing the material or to distributing it in a magazine.

²³⁵ See *ACLU v. Reno*, 929 F. Supp. at 845-48; *Shea v. Reno*, 930 F. Supp. at 933-34.

²³⁶ See *ACLU v. Reno*, 929 F. Supp. at 848-49; *Shea v. Reno*, 930 F. Supp. at 931.

²³⁷ See *ACLU v. Reno*, 929 F. Supp. at 838-42; *Shea v. Reno*, 930 F. Supp. at 931-33.

²³⁸ See *Shea v. Reno*, 930 F. Supp. at 941 (quoting *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988)).

²³⁹ See Hansen, *supra* note 230, at E-5.

CONCLUSION

This Note has examined obscenity issues as they are presented in the context of willing viewers downloading potentially obscene material on computer networks. It has developed a view of obscenity jurisprudence based on the competing privacy rights of willing viewers versus unconsenting adults and children, and demonstrated that the Court has found the rights of willing viewers to prevail in private contexts, and the rights of unconsenting adults and children to prevail in public contexts. This view explains the tension between the right to possess obscene materials in private and the right not to be accosted by them in public as a conflict of fundamental rights, and argues that the "public context" rationale and the consequent allowable regulation of obscene materials extend only as far as there is a risk of encroaching upon the right not to be accosted.

Computer-mediated communication provides a means to deliver potentially obscene material directly to protected, private contexts without risk of exposure to unconsenting adults and children. CMC therefore poses a direct challenge to the rationales grounding obscenity regulations. One recent prosecution shows the potential for counterintuitive and inequitable results if existing legal paradigms are misapplied to on-line transactions.

This Note evaluated several proposals for reform and rejected those that seek to create a unified theory of the First Amendment or of obscenity jurisprudence for the entire on-line environment. Such theories cannot accommodate even the present diversity of computer-mediated communication, much less modes yet to come. Instead, this Note advanced a transactional approach under which each on-line transaction is matched to the legal paradigm that shares its characteristic features.

Reviewing available paradigms for the most common on-line transaction—willing viewers downloading potentially obscene material on computer networks—this Note concluded that the most appropriate analogy is to a willing viewer traveling to another community and returning with the material. This paradigm is preferred because it uniquely respects (1) the fundamental principles of the First Amendment and obscenity law, (2) the scienter requirement of criminal law, and (3) the principles of equity.

Finally, this Note examined recent challenges to the Communications Decency Act and concluded that facts about the Internet found independently by two federal three-judge panels, which are likely to be ratified by the Supreme Court on review, strongly support the arguments of this Note.

The view advocated in this Note carries three practical implications. First, judges should carefully characterize on-line transactions

and choose the legal paradigm with matching characteristics. Second, there is a conceptual framework available in the existing law that will accommodate the most common on-line obscenity cases without distortion. And third, legislators should carefully consider whether regulation is necessary since there is existing law adequate to the task. If they decide to regulate, they should select the correct conceptual framework in order to satisfy constitutional requirements and to avoid collateral problems.

Donald T. Stepha

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